BRITISH COLUMBIA

Determination

Sent by Registered Mail

ER # 409360

May 13, 2019

Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as Golden Eagle Blueberry Farm

16351 Aquilini Avenue
Pitt Meadows
BC V3Y 1Z1

Aquilini Centre West
89 W. Georgia St.
Vancouver BC
V6B 0N8

Director of Employment Standards – and – Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as Golden Eagle Blueberry Farm

I have determined that the *Employment Standards Act* (the Act) has been contravened. Accordingly, the Complainants as named in Appendix A are entitled to wages and interest. Pursuant to section 79 of the Act, I require Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as Golden Eagle Blueberry Farm to pay the following:

Wages (section 17/18 of the Act)	$ 126,569.00
Annual vacation pay (section 58 of the Act)	$ 5,062.76
Subtotal	**$ 131,631.76**
Accrued interest (section 88 of the Act)	$ 2,106.11
A. Wages payable to employee	**$ 133,632.56**

Section 98(1) of the Act requires that a mandatory administrative penalty be imposed for each contravention of a requirement of the Act or Regulation. Penalty amounts are set out in section 29(1) of the Regulation.

Contravention	Work Location	Date	Amount
Section 8 of the Act	16351 Aquilini Avenue Pitt Meadows BC V3Y 1Z1	July 31, 2018	$ 500.00

B. Total administrative penalty amount	**$ 500.00**
C. Total amount payable	**$ 134,237.87**

I order Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as Golden Eagle Blueberry Farm to cease contravening the sections of the Act and Regulation determined to have been contravened and to comply with all of the requirements of the Act and Regulation.

I order Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as Golden Eagle Blueberry Farm to pay **$134,237.87**. Please send a certified cheque or money order payable to the Director of Employment Standards, P.O. Box 9570, Stn Prov Govt, Victoria, B.C., V8W 9K1, **within five working days**.

If statutory deductions are withheld from the wages payable to the employee (line A above), include a statement indicating the individual amounts remitted to Canada Revenue Agency. The administrative penalty (line B above) is not subject to statutory deductions. Additional interest begins to accrue at the end of the appeal period noted below on any amounts that remain unpaid.

If payment is not received within five working days, **collection proceedings may be commenced without further notice**. This may include filing the Determination in British Columbia Supreme Court and issuing a writ of seizure and sale to be executed by the Court Bailiff. Any fees and costs incurred by the Court Bailiff will be added to the Determination amount owing and will be charged to the Employer.

If you appeal this determination funds paid or collected will be held in the Director's trust account during the tribunal appeal process.

In accordance with section 87 of the Act, unpaid wages constitute a lien, charge and secured debt in favour of the Director of Employment Standards. The amount of this lien, charge and secured debt is payable and enforceable in priority over all other liens, judgments, charges and security interests except certain mortgage advances.

Under the Act, directors and officers of companies can also be required to pay wages owed to employees. Directors and officers who authorize, permit or acquiesce in a contravention of the Act are also liable to pay administrative penalties.

In accordance with section 101 of the Act, the Director may publish information relating to contraventions of the Act or Regulation including the identity of persons named in a Determination.

Sukh Kaila
Delegate of the Director of Employment Standards

cc:

Francesco Aquilini – Partner in Geri Partnership and Director of Global Coin Corporation
701, 151 Athletes Way
Vancouver BC V5Y 0E5

Paolo Aquilini – Partner in Geri Partnership
3180 W 55th Avenue
Vancouver BC V6N 3W9

Roberto Aquilini – Partner in Geri Partnership, Director of Global Coin Corporation and Director and Officer of CPI-Cranberry Plantation Incorporated
1818 Drummond Dr.
Vancouver BC V6T 1B8

CPI-Cranberry Plantation Incorporated – Partner in Geri Partnership
Aquilini Centre West
89 W Georgia St.
Vancouver BC V6B 0N8

Global Coin Corporation – Partner in Geri Partnership
Aquilini Centre West
89 W Georgia St.
Vancouver BC V6B 0N8

Lewis and Harris Trust Management Ltd. – Partner in Geri Partnership
Luigi and Elisa Aquilini Farm Trust,
By its Trustee
27th Floor 595 Burrard Street
Vancouver BC V7X 1J2

Michael Cytrynbaum – Director and Officer of Lewis and Harris Trust Management Ltd.
201 – 1236 Bidwell Street
Vancouver BC V6G 2K9

Luigi Aquilini – Director of Global Coin Corporation
Aquilini Centre West
89 W Georgia St.
Vancouver BC V6B 0N8

BC Federation of Labour
200-5188 Joyce St.
Vancouver BC V5R 4H1

Dignidad Migrante Society (Dignidad)
880 Malkin Ave.
Vancouver BC V6A 2K6

Appeal Information

Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on June 20, 2019.

The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at www.bcest.bc.ca or by phone at (604) 775-3512.

NOTICE TO DIRECTORS / OFFICERS

You are being provided with a copy of this determination because an online BC Registry Services search indicates you are a director or officer of this company. If information regarding your standing as a director or officer of this company is not current **it is your responsibility** to provide updated information to the Employment Standards Branch.

If you, as a director/officer of the company that is the subject of this Determination, dispute any of the findings contained in the Determination, you should ensure that the company files an appeal within the appeal period noted in the Determination.

The Employment Standards Branch will commence collection proceedings if voluntary payment is not made. If the Employment Standards Branch has difficulty collecting against the company, **proceedings will be commenced against directors and officers** of the company for the amount of their personal liability as set out in the Act. A director or officer may also be held liable for a penalty imposed on the company if he or she authorized, permitted or acquiesced in the company's contravention.

If a separate Determination is made against you as a director/officer of a company, you may not argue the merits of this Determination against the company by appealing the Determination that is made against you as a director/officer.

There are only three grounds on which you may appeal a Determination made against you as a director/officer:

1) That you were not a director/officer of the company at the time wages were earned or should have been paid;

2) That the calculation of your personal liability as a director/officer is incorrect; and/or,

3) That you should not be liable for the penalty, where a penalty has been imposed, on the grounds that you did not authorize, permit or acquiesce in the company's contravention.

EMPLOYMENT STANDARDS ACT
(excerpts)

Section 96: Corporate officer's liability for unpaid wages

96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

(2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,
(b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
(c) vacation pay that becomes payable after the director or officer ceases to hold office, or
(d) money that remains in an employee's time bank after the director or officer ceases to hold office.

(2.1) If a corporation that is a talent agency has received wages from an employer on behalf of an employee and fails to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations,

(a) a person who was a director or officer of the corporation at the time the wages were received is personally liable for the amount received by the corporation from the employer, less any fees allowed under the regulations, and
(b) that amount is considered for the purposes of subsection (3) to be unpaid wages.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1).

Section 98: Monetary penalties

98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.

(1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.

(1.2) A determination made by the director under section 79 must include a statement of the applicable penalty.

(2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

(3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person
(a) has been convicted of an offence under this Act or the regulations, or
(b) is also liable to pay a fine for an offence under section 125.

(4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Director of Employment Standards

Reasons for the Determination

ER #409360

Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as Golden Eagle Blueberry Farm

- and -

The Complainants as named in Appendix A

Delegate: Sukh Kaila
Delegate of the Director of Employment Standards

Date of Decision: May 13, 2019

INTRODUCTION

The Director received confidential and third party complaints under section 74 of the *Employment Standards Act* (the Act) that allege Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation,

Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as Golden Eagle Blueberry Farm (the Employer or Geri Partnership) contravened the Act by misrepresenting the minimum hours to be worked per week by temporary foreign workers (TFW's) it employed through the Federal Government's Agricultural Stream.

I have completed my investigation into the TFW's allegations. I am providing these reasons to set out the basis for my decision pursuant to section 81 of the Act.

To protect the privacy of the TFW's, the body of the Determination will only contain general information relevant to all of the complaints. Information and calculations specific to individual complaints and/or advocacy groups will be set out on separate summary sheets. Each Complainant will receive his or her own summary sheet and the third party will receive only the determination without the specific names of the TFW's. The Employer will receive all of the summary sheets.

BACKGROUND

A BC Registry Services Search conducted online on April 3, 2019, with a currency date of March 1, 2019, indicates that Geri Partnership started business on December 30, 2001 and registered the business on April 2, 2003. Francesco Aquilini, Paolo Aquilini and Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation and Lewis and Harris Trust Management Ltd. carrying on business as Geri Partnership are listed as the partners.

Geri Partnership operates an agricultural business in British Columbia which falls within the jurisdiction of the Act. The complaints were filed within the time period allowed under the Act. All of the employees fall within the definition of "farm worker" as defined in the Employment Standards Regulation.

The Employment Standards Branch (the "Branch") received the confidential complaints from TFW's(with the Migrant Workers Dignity Association (MWDA) acting as an advocate), on September 16, 2018. It received the third party complaint from the British Columbia Federation of Labour (BCFL) on behalf of 170 TFW's employed under the same federal program on September 19, 2018. The complaints were filed within the time period allowed under the Act.

The Employer was made aware of the complaints on September 21, 2018 by email and regular mail. Details of the complaints were shared at the same time.

On October 2, 2018, the Branch sent Geri Partnership a Demand for Employer Records by registered mail and email, requiring it to provide payroll records, including employment contracts, for all farm workers from March 21, 2018 to September 20, 2018. The records were received by the Branch on October 26, 2018. The records consisted of a generic copy of the employment contract signed and dated on February 19, 2018 used to hire Guatemalan employees, Labour Market Impact Assessments ("LMIA") and payroll records. The LMIA's provide information regarding the number of

employees Geri Partnership is able to bring from Guatemala as well as their duration of stay.

The records were reviewed and on January 11, 2019, Geri Partnership was requested to do a self-audit and calculate amounts owing to individuals who were not given the opportunity to work the number of hours per week stipulated in their individual employment contracts. On February 1, 2019, the Employer forwarded the results of the self-audit to the Branch. I sent a preliminary findings letter to Geri Partnership on February 15, 2019. I advised Geri Partnership that on the facts before me, it appeared it had contravened Section 8 of the Act, and I provided it an opportunity to provide evidence and submissions in that regard. On March 1, 2019, the Employer provided a response that included a written submission, a number of authorities and a statutory declaration from Holly Bedford, Paralegal with the law firm Harris and Company LLP, sworn on March 1, 2019 ("Bedford Declaration").

ISSUES

1) Did Geri Partnership, by not providing 40 hours of work every week of the TFW's employment, misrepresent the conditions of employment contrary to section 8 of the Act?
2) What wages, if any, are owed?

INFORMATION PROVIDED BY THE COMPLAINANTS

The MWDA and BCFL both allege that the TFW's were not provided with 40 hours of work per week as promised in their employment contracts.

The MWDA also alleges that workers were subject to improper tax deductions and that Geri Partnership paid wages "inappropriately", although it did not specify what that meant. Although the contracts of employment were for six months, certain employees did not receive six months of work and should be compensated for the shortfall.

The MDWA claims that the TFW's made payments ranging from $2,000 to $3,000 in order to secure employment with Geri Partnership. The payments were collected by an individual named Henry back in Guatemala. No information was provided regarding names of individuals who had paid, payment method or payment dates.

The MDWA states that all final wages were not paid before the TFW's returned to Guatemala. It claims that some wages were sent to Guatemala while some workers had difficulty accessing their funds due to bank account changes and disruptions. The MWDA does not allege that these wages are still outstanding but instead requests the Branch to guarantee that the Employer, moving forward, pay all outstanding wages before workers leave the country.

The MWDA also alleged that workers' health related issues were not addressed properly by the Employer.

INFORMATION PROVIDED BY GERI PARTNERSHIP

In response to the Demand for Employer Records, Geri Partnership provided names of employees and dates of employment, hours worked and amounts paid. It also provided copies of Labour Market Impact Assessments (LMIA) and employment contracts. Geri Partnership did not contest that the TFW's were not provided 40 hours per week and co-operated with the Director's investigation by completing the self-audit. On February 1, 2019, Alana Aquilini , Director of Sales and Marketing for Geri Partnership forwarded the results of the self-audit to the Branch. Geri Partnership provided calculations for each employee including amounts owing to those employees that did not receive 40 hours per week. Ms. Aquilini stated Geri Partnership's position that the contract did not guarantee 40 hours of work per week. In response to my preliminary findings letter, Geri Partnership provided submissions, a number of authorities and the Bedford Declaration. It did not provide any other evidence or information.

Misrepresentation

Geri Partnership denies it contravened Section 8 of the Act. It argues that the onus is on the Complainants to show the Employer contravened section 8.

Geri Partnership claims there is no evidence that a false representation was made by the Employer prior to the TFW's employment and that the contractual provisions in question do not amount to a false representation under Section 8 of the Act.

Geri Partnership argues section 8 is a "pre-hiring provision" and its protection only covers pre-hiring practices. As such, it is only within the pre-hiring period that a misrepresentation and a possible breach of Section 8 can be established.

In support of its position, the Employer argues that there is no evidence regarding pre-contractual or pre-hiring discussions. In particular, there is no evidence relating to:

- Whether the statement regarding 40 hours of work was false or misleading at the time the Complainants reviewed the contracts;
- What factual representations were made to each of the workers by the Employer during the pre-hiring timeframe and, in particular, when or if there was a discussion regarding the number of hours to be worked per week;
- When each of the workers relied on the representations; or
- When each of the Workers read, reviewed and executed the contracts.

Geri Partnership argues that once the contract of employment is signed, Section 8 no longer applies. It may be that failing to provide 40 hours of work a week is a breach of contract; however, it is not misrepresentation pursuant to Section 8 of the Act.

Geri Partnership also argues that the Director's interpretation of the Contract is incorrect in law and the provision in the contract regarding hours of work does not provide a

guarantee of 40 hours per week. Accordingly, it cannot be considered a representation pursuant to Section 8 of the Act.

The Bedford Declaration contains Exhibit "A", which is a true copy of an employment contract with the Employer information filled out and an employer signature of Sergio Olano dated February 20, 2018. The information for the employee is not filled out.

The "Exhibit A" employment contract differs from the contracts that were provided by the Employer in response to the Demand for Employer Records, specifically at clause 1 and clause 5. In "Exhibit A", clause 1 reads "the contract shall have a duration of 24 months from the date the temporary foreign worker assumes his/her functions" and clause 5 states the current residence (of the TFW's) is the Philippines. In the copy previously provided by the Employer, clause 1 reads "6 months" and states the current residence is Guatemala. Both copies of the contract are signed by Sergio Olano.

The employment contract sets out the following provisions:

3. Work Schedule
3.1 The temporary foreign worker shall work 40 hours per week and shall receive __ % more than the regular wages for the hours worked over this limit, where provincial law permits. His/her workday shall begin at ___ and end at ___ or, if the schedule varies by day, specify:
"rotational shifts, may require varied start and end times" inserted

4. Wages and Deductions
4.1 The employer agrees to pay the temporary foreign worker, for his/her work, a wage of $11.35 per hour ...

Geri Partnership emphasizes the inclusion of clause 4.1 and argues that it would have been unnecessary to specify an hourly wage rate if there was a guarantee of 40 hours per week, as the contracts could easily have provided for a weekly wage or salary. The inclusion of an hourly rate demonstrates that the intention of the parties was to compensate workers for the number of hours worked and could not have intended that the worker would be paid for hours not worked. Given the context, clause 3.1 must be read to mean the workers are to be paid additional wages for working more than 40 hours a week, not that they are guaranteed 40 hours of work a week.

Breach of Natural Justice

In the alternative, Geri Partnership argues that the Director's decision is a breach of natural justice and demonstrates a reasonable apprehension of bias. They argue that in sending the preliminary findings letter, the Director pre-judged the issue and deprived the Employer of a fair opportunity to respond to the Complaints.

Counsel for the Employer provided several authorities in support of its position. I have reviewed them but will only address those that I find helpful.

THE TEMPORARY FOREIGN WORKER RECRUITMENT PROCESS

During my investigation of this matter, I reviewed the Government of Canada's website regarding the process for recruiting a temporary foreign worker through the agricultural stream. (https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/agricultural.html)

That process stipulates that to bring a temporary foreign worker to Canada, an Employer must obtain an LMIA from the federal government. An employer then provides this LMIA, along with an employment contract to the prospective temporary foreign worker. The temporary foreign worker then submits these documents, along with an application to the federal government, for a work permit to enter Canada. The temporary foreign worker package, including the LMIA and the Employment Contract, are reviewed by federal immigration officials to determine whether they will grant the work permit to the temporary foreign worker.

It is the employer's responsibility to obtain a LMIA, and to draft and send the employment contract to the prospective worker. The Government of Canada's website includes instructions to the employer on drafting the employment contract. These instructions state at https://www.canada.ca/content/dam/esdc-edsc/documents/services/foreign-workers/median-wage/low/employment_contract.pdf:

> *The purpose of an employment contract is to:*
>
> *• Have a written, detailed description of the job. It includes for example, the maximum number of hours of work per week, wage rate and whether overtime will be paid. The contract must be signed by both the employer and employee.*
>
> *• Describe the terms and conditions of employment.*
>
> *• Articulate the employer's responsibilities and the worker's rights.*
>
> *• Help ensure that the worker gets fair working arrangements.*
>
> *The employment contract must respect provincial labour laws that establish minimum employment standards such as the minimum wage.*

FINDINGS AND ANALYSIS

The BCFL and the MWDA both made allegations that the TFW's did not receive 40 hours of work per week as stipulated in their contracts. The MWDA has made several other allegations including that the TFW's did not receive six months of work as stipulated in the contract.

Neither the BCFL complaint, nor the confidential complaints by the complainants represented by MWDA include information pertaining to what conversations they had before they came to Canada or what their expectations were regarding how many hours they would work or how many months' work would be available for them in British Columbia.

Geri Partnerships did not provide any information regarding their expectations of the TFW's, and their position is that the Complainants must prove misrepresentation to support a finding of a contravention of s.8 of the Act. .

Clause 1.1 of the contract states that, "This contract shall have a duration of 6 months from the date the temporary foreign worker assumes his/her functions." The MWDA argues that this section should be interpreted to mean that each TFW who executed the contract was entitled to six months' of work and should be paid for six months of work regardless of the circumstances.

It is a well-established principle that a contract is to be interpreted in a way that that furthers the intentions of the parties as can best be determined from the entirety of the agreement. This means that each term in a contract must be interpreted, to the extent possible, harmoniously with the other terms of the contract.

There are several provisions of the contract that contemplate situations under which a contract could be terminated before six months. Specifically:

- Clause 5.3, which discusses what would occur if a TFW's employment is terminated and the TFW was hired by a new employer;

- Clause 9.1, which gives a TFW the ability to terminate the contract; and

- Clause 10.1, which gives the employer the ability to terminate the contract.

When clauses 1.1, 5.3, 9.1, and 10.1 are read harmoniously together, it is clear that the parties never intended clause 1.1 to constitute a promise on the part of the Employer that each TFW would receive six months' worth of work. Accordingly, I find there is no plain interpretation that would suggest that the Employer misrepresented the duration of the contract. Accordingly, I am not persuaded by the MWDA or the BCFL's argument that the TFW's are entitled to six months wages. I find that Geri did not contravene section 8 of the Act by misrepresenting the duration of the contract to the TFW's.

The MWDA also alleges that TFW's were charged monies in Guatemala for an opportunity to work for Geri Partnership in British Columbia. It did not provide any further evidence of this allegation. While section 10 of the Act does not allow such payments to be collected by employers or other persons in exchange for

employment, there was no evidence; only MWDA's allegation that someone named Henry in Guatemala charged fees to the TFW's. This is not a sufficient basis for me to make any finding on whether there has been a contravention of s.10. Moreover, given that the alleged payments occurred in a different jurisdiction and have no evidentiary connection to Geri Partnership, I find there is insufficient evidence to support a finding of a contravention of section 10.

I have reviewed the remaining allegations about housing and working conditions made by the MWDA and I find they are not within the mandate of the Act. This leaves only the issue of misrepresentation in relation to clause 3 of the employment contract and Geri Partnership's objections to the investigation process to be addressed in this determination.

Misrepresentation

Geri Partnership argues that in proving a contravention of Section 8, the onus is on the Complainants to show the Employer contravened the Act. In considering this argument, I find the following words from *Gordon Cameron*, BC EST #RD100/06 relevant:

> ...the legal burden will not have a bearing on the decision unless, after considering all of the evidence, the evidence is so evenly balanced that the Tribunal can come to no sure conclusion: Robins v. National Trust Co. [1927] A.C. 515 (P.C.)

As noted above, ultimately the notion of onus or burden of proof is only of significance where the evidence is so evenly balanced so as to preclude a sure conclusion. This is not the case here. In the present case, I have evidence in the form of an employment contract. I would further note that this contract, and the LMIA application drafted by Geri Partnership, were submitted to the Federal Government for the purposes of procuring entry into Canada by the TFWs. As such, not only does the employment contract demonstrate what representations were made by Geri Partnership to the TFW's; the contract also demonstrates what representations were made by Geri Partnership to the Federal Government for the purpose of determining the Employer's eligibility to bring temporary foreign workers to Canada. The Government of Canada website referred to above also includes the following statement: "The contract assists ESDC/Service Canada officers in forming their Labour Market Opinions, pursuant to their role under the Immigration and Refugee Protection Regulations." I am satisfied that I can rely on this contract as evidence of what was represented to the Federal Government and the TFW's in relation to their prospective employment with Geri Partnership.

Geri Partnership argues that Section 8 of the Act applies only to pre-hiring provisions and that its protections cease when an employment contract is signed by the parties. They say that although the failure to provide 40 hours a week can be a breach of contract, it cannot be a misrepresentation under section 8. Geri Partnership relies on *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, to argue that in the absence of evidence regarding pre-contractual conversations regarding representations made to TFW's, there is no basis for the Director to find that section 8 has been contravened.

Although section 8 of the Act usually applies to "pre-hiring provisions", that term is broad enough to include the employment contract and the enforcement of its terms and conditions. This understanding is supported by *CYOP Systems International et al.*, BC EST #D020/03, wherein the Employment Standards Tribunal (the "Tribunal") held that section 8 of the Act was contravened by the employer misrepresenting the 'wages' and 'conditions of employment' as they were set out in the employment contract.

Section 8 of the Act reads as follows:

No false representations

8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:

(a) the availability of a position,
(b) the type of work,
(c) the wages, or
(d) the conditions of employment.

The section separates the phrase related to becoming an employee from the phrase related to working or being available for work, by use of a comma and the word "or".

Accordingly, an interpretation of Section 8 of the Act and in particular a focus on the words "to work or to be available for work" implies that the legislation extends beyond just pre-hiring provisions to apply to situations where an employee performs work for an employer. This view is supported by *Pioneer Distributors Ltd.*, BC EST #RD012/13, at paragraph 60 where the Tribunal said of representations made through the complainant's employment that "In effect, these representations were section 8(c) representations ..."

Section 1 of the Act defines "**conditions of employment",** used in section 8(d), to mean "all matters and circumstances that in any way affect the employment relationship of employers and employees." This broad and expansive definition permits employees to seek protection within the Act from employers misrepresenting the conditions of employment such as contractual terms regarding hours of work. This understanding is consistent with the intent, meaning and spirit of the Act which purports to extend its protections to as many employees as possible as supported by both *Machtinger v. HOJ Industries Ltd., (1992) 1 S.C.R. 986* and *Re: Rizzo v. Rizzo Shoes* ([1998]), 1 S.C.R. 27).

I find the employment contract is valid evidence upon which to determine whether Geri Partnership influenced the employees in question to become employees and to work or be available to work by misrepresenting the conditions of employment, and I turn to an examination of the contract.

Geri Partnership has not provided any evidence to indicate representations different from those in the employment contract were ever made to the TFW's. The

Complainants, on the other hand, rely on the wording in the contract and specifically clause 3.1 to support their allegation that a misrepresentation occurred as per section 8 of the Act. Moreover, the representations in the contract about the number of hours of work available for temporary foreign workers were presumably submitted to federal immigration officials. This information formed the basis for whether they would issue LMIA's to the Employer and work permits to the TFW's to allow them to enter Canada to perform work for the Employer. Lastly, as indicated in the self-audit results and as repeatedly acknowledged in arguments from Counsel, Geri Partnership does not dispute that the employees did not receive 40 hours of work in each pay period that they worked. Accordingly, I find that the wording in the contract is the best and most persuasive evidence of what was represented to the TFW's (and to federal immigration officials) of the hours of work that would be available.

As Geri Partnership notes, the goal of contract interpretation is to determine, objectively, the parties' intentions at the time the contract is made. The words of the contract are the primary source, and the words are to be given their ordinary meaning unless the context dictates otherwise.

In *Grant Howard*, BC EST # D011/07, in a discussion of how to interpret contracts, the Tribunal quoted the decision of *Gilchrist v. Western Star Trucks Ltd.*, 2000 BCCA 70, paragraphs 17 and 18, as follows:

> The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: *Delisle v. Bulman Group Ltd.* (1991), 54 B.C.L.R. (2d) 343 (S.C.), approved by Chief Justice McEachern in *Bramalea Ltd. v. Vancouver School Board No. 39* (1992), 65 B.C.L.R. (2d) 334 (C.A.); *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 161 D.L.R. (4th) 1, (S.C.C.).
>
> The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 72 B.C.L.R. (2d) 273 (C.A.); *Melanesian Mission Trust Board v. Australian Mutual Provident Society*, [1997] 1 N.Z.L.R. 391 (P.C.)

The contract signed by the TFW's is divided into 11 specific clauses. Clauses 3 and 4 are relevant to this issue. Clause 3 is labelled 'Work Schedule' and exclusively deals with such. Directly below it is clause 3.1 which states that the "temporary foreign worker

shall work 40 hours a week **and** shall receive ___% more than the regular wages for hours worked over this limit ..." [emphasis mine].

It is Geri Partnership's position that clause 3.1 merely places an obligation on the TFW's to work 40 hours before they are entitled to additional wages. However, the word 'shall' in the first part of clause 3.1 is used in the **mandatory** sense, and that part of the sentence is not qualified in any way. I find the plain meaning of that part of the sentence to be exactly what it says: workers shall work 40 hours per week. The second part of the sentence is connected to the first with the word "and". I find the second half of the sentence means what Geri Partnership argues the whole sentence means: if the TFW's work more than 40 hours they shall receive an undisclosed amount more than their regular wage rate "for hours worked over this limit". "This limit" refers to the 40 hours a week the workers "shall" work in the first half of the sentence. The two parts of that sentence read together mean that the TFW's will work 40 hours work a week, and if they work more than 40 hours, they will then be entitled to be paid an undisclosed amount more than their regular wages for the extra hours worked.

In summary, I find that the phrase "temporary foreign workers shall work 40 hours a week" in the first half of the sentence means they will be provided with 40 hours of work a week. I find the Employer's argument that clause 3.1 means that workers would be paid additional wages after working 40 hours a week only addresses the meaning of the second part of the sentence and ignores the ordinary meaning of the first part of the sentence when the sentence is read as a whole.

Geri Partnership further argues that the inclusion of an hourly rate in clause 4.1 demonstrates the intention of the parties was to compensate workers only for the number of hours worked. The Employer claims that if it intended to guarantee 40 hours of work per week it would have characterized the wages in a salary form. This ignores the fact that the form of the contract was set out on the federal government website and that the clause 4.1 only provides for an hourly rate (or a piece rate in B.C.) There is no provision in clause 4.1 to set a weekly or monthly salary. In addition, the Act requires that employers keep track of hours worked by employees each day regardless of how they are paid.

I find clauses 3 and 4 serve separate and distinct purposes. Clause 3 is named 'Work Schedule' and identifies the number of hours an employee shall work. Clause 4 is named 'Wages and Deductions' and identifies the remuneration for each hour of work. I find the wording of clause 4.1 simply identifies an hourly wage rate for purposes of wage calculation. I find that clause 3 and 4 combined communicate to an employee the total remuneration he or she can expect to receive based on 40 hours a week multiplied by the established hourly rate.

In addition, given the inequality of bargaining power between an employer and a temporary foreign worker who has left their homeland and family to work abroad in British Columbia, I find that any ambiguity in the terms of the contract should be interpreted against the interests of the Employer, who as noted above, is responsible for

preparing the contract of employment under the Federal Government TFW Agricultural Stream program. This accords with the long established principle that when two contracting parties disagree on a contractual provision, the preferred meaning should be the one that works against the interests of the party who provided the wording. I would further note that this interpretation also accords with the principles of contract interpretation (admittedly in the different context of termination provisions) outlined by the BC Court of Appeal in *Miller v. Convergys CMG Canada Limited*, 2014 BCCA 311. In that case, the BCCA noted that employment contracts should be interpreted in a way that prefers employment law principles; specifically the protection of vulnerable employees in their dealings with their employers. Given the facts in the present case, which involves vulnerable temporary foreign workers, I find this direction on contract interpretation from the BCCA particularly relevant.

Breach of Natural Justice

Geri Partnership argues in the alternative, that even if the contractual terms can be relied on as evidence of misrepresentation, the Director's process is flawed because it failed to observe principles of natural justice. Specifically, Geri Partnership argues that by drafting and delivering a preliminary findings letter the Director demonstrated bias.

An allegation of bias must be proven on the evidence as noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST# D043/99 (Reconsideration of BC EST # D101/98). The test for determining bias is an objective one and cannot be made speculatively. The onus of demonstrating an apprehension of bias lies with the person who is alleging its existence and demands "clear and convincing" objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of reasonable apprehension of bias.

Geri Partnership has presented no evidence of any kind, indicating a "real likelihood or probability" of any bias and their allegation of a breach of natural justice is premised on the fact that a preliminary findings letter was provided in relation to this investigation. Counsel for the Employer takes the position that this was a pre-judgement of the matter. This argument is not supported on the facts. As was clearly outlined in the letter, the purpose of preparing and sending a preliminary findings letter to Geri Partnership was to outline and address the Employer's position as detailed in Alana Aquilini's email of February 1, 2019 as well as to invite the Employer to present their response along with any further supporting evidence and documentation. In advance of the preliminary findings letter all documentation provided by the Complainants was shared with the Employer on September 21, 2018. Although I advised that if I did not receive any further information I would make my decision based on the evidence currently before me, the Employer did provide further evidence, which I have considered and incorporated into this determination. Accordingly, I find that Geri Partnership's allegation lacks any "clear and convincing" evidence that the Director's process was biased or breached natural justice,

Based on the evidence, I find Geri Partnership is in contravention of Section 8 of the Act by representing to the TFW's that they would be paid for 40 hours each week they worked. The employment contract did not outline that there might be fluctuations in the hours available to the TFW's when they arrived in Canada to perform work for the Employer, and the Employer admits that the TFW's were not given 40 hours or work each week. The date of contravention is the first pay period in which the employees did not receive 40 hours of work. Based on the payroll records this date is July 31, 2018 and I impose a $500 penalty.

Remedy

Having determined that Geri Partnership contravened section 8 of the Act, y, I now turn my attention to a remedy. The remedy for contravening this section is a "make whole" remedy, which means the employer will be required to compensate the employee in such a way as to put him or her back in the same position as if the contravention had not occurred. Under s. 79(2) of the Act, the employer may be required to:

- hire the person and pay any lost wages;
- reinstate a person and pay any lost wages;
- pay a person compensation instead of reinstatement; and/or
- pay for reasonable and actual out of pocket expenses.

I find it appropriate under the circumstances to exercise my discretion and order Geri Partnership to pay the TFW's affected by this contravention the wages they should have received under the employment contract. The make whole approach in this case consists of providing TFW's wages for 40 hours per week for the period in question. Geri Partnership performed a self-audit and has provided a detailed breakdown of wages owing to employees who did not receive the stipulated 40 hours per week. I have reviewed and cross-referenced these calculations with the payroll records provided by the Employer as a result of the Demand for Employer Records and find them to be reliable.

Accordingly, I order Geri Partnerships to pay $126,569.00 plus 4% vacation pay owing to the TFW's. A detailed breakdown for each TFW is provided at the end of this determination (Appendix B) including interest pursuant to Section 88 of the Act.

Sukh Kaila
Delegate of the Director of Employment Standards